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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KACEE EUGENE SMITH,

Defendant and Appellant.

F066184

(Super. Ct. No. 11CM2885)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Candace Hale, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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\* Before Kane, Acting P.J., Detjen, J., and Franson, J.

## PROCEDURAL SUMMARY

### *Allegations*

Appellant, Kacee Eugene Smith, was charged in a second amended information filed on October 17, 2012, with two counts of unlawful sexual penetration of a minor 10 years old or younger by a person 18 years of age or older (Pen. Code, § 288.7, subd. (b), counts 1 & 2)<sup>1</sup> and six counts of lewd conduct upon a minor under the age of 14 (§ 288, subd. (a), counts 3 through 8).<sup>2</sup> The information further alleged as to counts 3 through 8 that appellant committed his offenses against more than one victim (§ 667.61, subds. (a) & (e)).

### *First Marsden Hearing*

Prior to trial, on May 24, 2012, appellant brought a *Marsden*<sup>3</sup> motion. Appellant alleged that there was no evidence that he did anything wrong, except through the hearsay statements of the victims' mother, and appellant gave his attorney information about witnesses and nothing had been looked at. Appellant believed the mother did not like him. Appellant's trial counsel explained that appellant believed there was a reason the victims' mother was angry at him and an incident was witnessed by a pastor of a church. Counsel had sent his investigators to talk to the pastor and other witnesses, but the potential witnesses never responded.

Counsel explained to the court that he was willing to subpoena the witnesses to court, but would not call them as witnesses if they refused to be interviewed. Counsel told the court a plea bargain was offered by the prosecutor of 12 years in prison, reduced from an earlier offer of 18 years in prison, but appellant wanted his day in court to

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<sup>1</sup> Unless otherwise designated, all statutory references are to the Penal Code.

<sup>2</sup> The alleged victim in counts 1, 3, and 4 was A.M. The alleged victim in counts 2, 5, and 6 was H.M. The alleged victim in counts 7 and 8 was H.B. A.M. was born in September 2002 and was eight years old when the authorities were contacted. H.M. was two years younger. H.B. was born in late 2002.

<sup>3</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

express his viewpoint. Counsel had read a written statement of the case prepared by appellant.

Appellant alleged there was abuse of one child by the child's father. Counsel had investigated the allegation and found no filing or investigation with Child Protective Services (C.P.S.). The court observed that it appeared counsel was doing a good job for appellant. Appellant conceded that he was doing a good job, but complained about the investigator. Counsel explained appellant's view that the mother was influencing the children to bring the allegations. Appellant reiterated his contention that he had been in jail for 10 months for something he did not do. The court found no basis for the *Marsden* motion and denied it.

### ***Trial Verdict and Second Marsden Hearing***

At the conclusion of a jury trial on October 17, 2012, appellant was found guilty as charged in the second amended information. Immediately prior to sentencing, appellant brought a second *Marsden* motion. Appellant specifically stated that he was complaining not about his counsel's representation, but about his anger toward the court because appellant had not done anything. Appellant complained that he thought there was no evidence against him. Appellant reiterated that he was not unhappy with his attorney's representation, but with the process including the fact that it did not take the jury long to deliberate.

Trial counsel explained that some of appellant's allegations, such as a complaint about the father to C.P.S., did not pan out. Counsel explained that appellant's defense that the mother put the children up to making the allegations against him was addressed at trial. Counsel's concern was that appellant was facing a sentence in excess of 100 years to life and the prosecutor ultimately offered less than 10 years of a determinate sentence. Counsel told the court that appellant accused counsel and the investigator of being prejudiced against black people.

Counsel told appellant, “You know, I even married an alien myself. I have no prejudice against you.” Counsel further explained to appellant that although he enjoyed trial work and was not trying to avoid a trial, he advised appellant not to go to trial because counsel thought they were going to lose. The court did not grant the *Marsden* motion.

### ***Sentencing***

On November 15, 2012, appellant was sentenced to 15 years to life on count 1. Appellant was sentenced to consecutive sentences on counts 2 through 8 of 15 years to life for a total prison term of 120 years to life. The court imposed a restitution fine of \$10,000 as well as various other fines, fees, penalties, and assessments. The court granted actual custody credits of 436 days, conduct credits of 65 days, for total custody credits of 501 days.

Appellate counsel has filed a brief seeking independent review of the case by this court pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

### **FACTS**

L.R.’s husband became friends with appellant. Because he was disabled, L.R. and her husband later became appellant’s in-home caretakers. L.R.’s husband assisted appellant financially, paying for his medicine, medical treatment, and transportation. Appellant lived with the R.’s for a few months in 2010 and again in 2011. The R.’s children visited appellant overnight from time to time at his apartment across the street.<sup>4</sup>

### ***Counts 1, 3, & 4***

In September 2011, L.R.’s daughter A.M., reported things were happening to her. L.R. called the other children into the house and they also began to discuss things that

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<sup>4</sup> The R.’s had three daughters. They were also charged with the care of H.B., a young boy who is a family member. For ease of description and to maintain the confidentiality of the victims, the four children are referred to as siblings in the factual presentation.

were happening to them. On September 6, 2011, L.R. called her pastor to bring her husband home and then called the police. A.M. was shaky, swallowing, and pausing as she told L.R. what was happening to her. Appellant was living with the family at that time. L.R. only talked to the children one time because of a medical condition that was making her emotional.

A.M. went to appellant's apartment with her brothers and sisters and sometimes stayed there overnight. A.M. would sleep in appellant's bed, he would sleep on the ground. Sometimes, A.M. and her siblings would watch television at appellant's apartment. A.M. would sit on the bed.

A.M. stated that when she was at appellant's apartment, he would take off her clothes. Using a chart of a female human body, A.M. identified the different parts of the body, including nipples and the privates. A.M. said appellant would take off her shirt while she was asleep on the bed with her siblings.

A.M. and her family moved to another residence away from appellant's apartment. Appellant moved into the new residence. Again, appellant would take off A.M.'s shirt when she was in his room watching television in the evening. A.M.'s sisters were in the bedroom with her. After taking off her shirt, appellant would wipe lotion on A.M.'s back. A.M.'s sisters were on the other side of the bed sleeping when this occurred. A.M. told appellant to stop.

A.M. remembered two occasions when appellant took off her pants. This also occurred in the new residence. On one occasion, A.M. was in appellant's room during the daytime and fell asleep there. She was wearing her school clothes. A.M. woke up because one of her sisters came into the room and slammed the door. A.M. was still wearing her panties. A.M. did not remember being touched by appellant on this occasion.

On the second occasion that A.M.'s pants were off, she remembered appellant rubbing lotion on her legs and her private with his hand. A.M. told appellant to stop.

H.M. was in the room with A.M. watching television. Appellant told A.M. twice not to tell anyone what had happened or he would hurt her. A.M. remembered there was black string tied around her hands when appellant touched her. A.M. could not move her hands. A.M. demonstrated that when her hands were tied up, her hands were above her head about three inches.

A.M. could not remember many details of what happened, including whether appellant had his clothes off during any of the incidents. A.M. was shown a diagram of male anatomy. She identified the penis, referring to it as a private. A.M. said that appellant grabbed her hand and had her touch his private part with it. A.M. asked appellant to stop because he was hurting her hand as he grabbed it. Sometimes appellant would use lotion when he touched A.M.'s private part.

When appellant touched A.M.'s private, it would hurt because appellant was pushing hard. Appellant's skin was under A.M.'s clothing. Every time appellant did this, it hurt A.M. A.M. demonstrated how appellant touched her private parts with his hand by placing her hand on the counter. This form of touching happened once at the new home. A.M. remembered being questioned by investigators about these incidents and said that she was being truthful when she was answering their questions. A.M. had difficulty remembering everything that happened and what she told investigators because it happened a long time ago.

Officer Janet Hanes of the Lemoore Police Department was involved in the investigation of the case and present during the questioning of the children by a "forensic interviewer." A.M. was questioned on September 22, 2011. Concerning the incident at appellant's apartment, A.M. said appellant touched her privates using his finger and lotion.

Concerning the incident in the new residence, A.M. said that when appellant touched her private with his finger, it went inside A.M.'s private. A.M. also said appellant was moving his finger inside of her and it hurt. A.M. further said that she was

tied up with a shoelace, it was above her head, and the shoelace was tied to something above her head that held up the curtain. A.M. said she could not move. Appellant threatened to hit A.M. if she told anyone what had happened.

***Counts 2, 5, & 6***

H.M. was shown a chart of the female human body. H.M. identified body parts. H.M. identified her nipple with the letter N and her private part with the letter P.<sup>5</sup> One of the times appellant touched H.M.'s nipple was in the new home. A.M. was in the room with H.M. when this occurred. Appellant would pick A.M. and H.M. up while they were sleeping and place them in his room. Appellant touched H.M.'s nipple while she was still in her own bed.

H.M. was not initially aware of this happening because she was still asleep. A.M. woke her up to tell H.M. what had happened. On another occasion, H.M. was awake and appellant was pretending to be asleep while he touched H.M.'s nipple. H.M. told him to quit. Appellant replied that he was not doing anything. Appellant pulled up H.M.'s shirt and then touched her skin.

Appellant touched H.M.'s nipple more than once. It also happened in their first house once when appellant spent the night there. Appellant had a bed in the living room. H.M. was sleeping on a blue couch next to the appellant's bed. H.M. ended up on appellant's bed. She was wearing pants and a T-shirt. Appellant pulled down H.M.'s pants when she was asleep. H.M.'s sisters told H.M. appellant was pulling down her pants. H.M. would wake up in appellant's bed and her pants would be pulled down.

H.M. explained that appellant touched her private part in both homes. On one evening H.M. was in appellant's room in the new house. Appellant pulled H.M.'s pants down. Although H.M. was usually asleep when this occurred, one time she woke up. H.M. told appellant to quit it, she hit him, and told appellant she was going to tell her

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<sup>5</sup> Throughout her testimony, H.M. identified her nipple as N and her private part as P.

mother. On this occasion, H.M. felt her pants going down. Appellant was touching H.M.'s private part with his finger and it hurt on the inside of her private part. When appellant touched H.M.'s private part with his finger, appellant would move his finger. This happened to H.M. more than once at both houses.

On one occasion, appellant touched H.M.'s private part and pushed her legs apart with his leg. Appellant unbuckled H.M.'s pants and pulled them down. Appellant also moved H.M. close to him and moved his whole body up and down while she was lying down. Appellant's stomach would be touching H.M.'s stomach. Both H.M. and appellant were wearing their clothes. It felt uncomfortable to H.M. This happened once.

Appellant bribed H.M. with candy so she would not tell her mother what happened. Appellant bribed H.M. with candy all the time, "before church or whenever." H.M. once saw appellant moving his fingers under the blanket close to A.M. H.M. once saw appellant pull down the pants of another older sister while that sister was asleep. One time while watching television at appellant's house, H.M. was playing with the remote and the channel changed to a nasty show with naked people.

### ***Counts 7 & 8***

H.B. was shown a chart of the male human body and identified body parts on it, including the private part. H.B. testified that when he was eight years old, H.B. was in the bedroom of appellant's apartment and appellant played with H.B.'s private in the early morning. Appellant would take his finger and move it in a circle around H.B.'s private. H.B. would pretend to be asleep. It would stop when appellant went to the bathroom. H.B. would pull his pants up and get out of bed. Appellant would ask H.B. what he was doing up because appellant thought H.B. was asleep. H.B. would not say anything.

Appellant would give the children snacks and they would watch television with him. One night, H.B. was falling asleep in appellant's room. H.B. woke up in the middle of the night in appellant's bed. Appellant was being "nasty" and appellant "got stuff that



he told me about on [H.B.'s] hand.” It felt liquidy. H.B. did not think appellant had his clothes on. H.B. could not remember how he got the stuff on his hand and could not remember if appellant was touching him prior to discovering the stuff on his hand. H.B. was in appellant’s bed when this incident occurred.

Once, H.B. had to touch appellant’s body in the new home. H.B. was in appellant’s room one afternoon. H.B. would help appellant get his clothes on and off because appellant is disabled. H.B. was helping appellant undress and there was stuff on appellant’s private that was white and fuzzy. H.B. took it off of appellant’s private with his hand. In a room where there were pictures of a dog and a little cat on the wall, appellant had cameras and a tape recorder.

Appellant told H.B. to keep it a secret or appellant would beat him like his biological mother did to him. Appellant also touched H.B.’s leg with his private. H.B. woke up one time and saw appellant’s naked private on his leg. H.B. also saw appellant take the girls into his room while they were asleep.

Appellant told the police that he never touched H.B. According to appellant, the girls always wanted to stay in his bed and he never carried them there. Appellant admitted that the children would stay in bed with him.

### ***Expert Testimony***

Dr. Susan Napolitano testified as an expert in child sexual abuse accommodation syndrome. Dr. Napolitano explained it is a myth that children will report sexual abuse as soon as it happens. It is a myth that a child responds to abuse like an adult who would say no, physically fight the abuser, and immediately tell someone what happened. It is also a myth that if the child did not follow the predictable sequence of events, the child must be lying and there is another explanation for the sexual abuse allegation. Reports of abuse are often delayed and unconvincing and can occur in stages. Sometimes a child will describe something that sounds like sexual abuse and then shut down.

In child sexual abuse accommodation syndrome, a traumatized child who is the victim of sexual abuse may not resist the abuse. The child can feel helpless and entrapped and will often not fight back. At times, the child will allow the abuse to continue. Later, the victim may experience mental health symptoms such as eating disorders, cutting oneself, or suicide attempts. Dr. Napolitano explained that the child sexual abuse accommodation syndrome cannot be used to definitely diagnose whether abuse in fact happened.

***Limiting and Unanimity Instructions***

The trial court instructed the jury that Dr. Napolitano's testimony regarding child sexual abuse accommodation syndrome was not evidence that appellant committed any of the allegations charged against him and the evidence could only be considered in deciding whether or not the alleged victims' conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of the victims' testimony.

In addition to standard jury instructions concerning deliberations, and the evaluation of evidence and witness testimony, the court instructed the jury on all of the elements of the charged offenses and instructed the jury on reasonable doubt. The court also gave the jury a unanimity instruction (CALCRIM No. 3501) as follows:

“The defendant is charged with lewd and lascivious acts upon a minor, in violation of Penal Code Section 288(a), and Counts 3 through 8 some time between the period of August 1st, 2010 and September 6, 2011. The People have presented evidence of more than one act to prove the defendant committed these offenses. You must not find the defendant guilty unless:

“Number one, you all agree that the People have proved the defendant committed at least one of these acts, and you all agree on which act he committed for each offense.

“Or two, you all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this period of time, and you

[sic]<sup>6</sup> have proved that the defendant committed at least the number of offenses charged.”

### **APPELLATE COURT REVIEW**

Appellant’s appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*Wende, supra*, 25 Cal.3d 436.) By letter on July 11, 2013, we invited appellant to submit additional briefing. To date, he has not done so.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

### **DISPOSITION**

The judgment is affirmed.

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<sup>6</sup> In its oral instruction, the trial court apparently misspoke and added the word “you” to the unanimity instruction. The written jury instructions, however, were sent with the jury during deliberations. In the written instructions, the word “you” as said by the trial court is absent.